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No. 88-349

In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether 5 U.S.C. 7114(b)(4) and the Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, require the disclosure of employee home addresses to the labor union that represents those employees, but only after each employee has been individually consulted and given a chance to veto the disclosure of his or her home address.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-32a) is reported at 836 F.2d 1139. The opinions of the Federal Labor Relations Authority (Pet. App. 38a-55a, 81a-89a) are reported at 23 F.L.R.A. 788 and 24 F.L.R.A. 43.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-32a) was entered on January 15, 1988. Petitions for rehearing were denied on March 29, 1988

(Pet. App. 35a-36a), and the order denying rehearing was amended on April 1, 1988 (Pet. App. 37a). On June 21, 1988, Justice Blackmun extended the time within which to petition for a writ of certiorari to and including August 29, 1988. The petition was filed on August 26, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two decisions of the Federal Labor Relations Authority (Authority or FLRA) holding that federal agencies are required by the Federal Service Labor-Management Relations Statute (Civil Service Reform Act of 1978, Tit. VII) (Labor Statute), 5 U.S.C. (& Supp. IV) 7101 *et seq.* —specifically 5 U.S.C. 7114(b)(4)—to provide to unions the names and home addresses of federal employees who are within the "bargaining units" represented by the unions but are not necessarily union members. The court of appeals generally affirmed the Authority's decisions but remanded for the Authority to devise a procedure for individual employees to decide whether their addresses would be released to the unions.

1. Section 7114(b)(4) of the Labor Statute requires a federal employer to furnish "data" to the union representative of a bargaining unit "which is [*sic*] reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining," but only "to the extent" that provision of such information is "not prohibited by law." After initially holding that this statute does not require federal employers to provide a labor union with names

and home addresses of employees represented by the union, the Authority reversed itself to hold that such disclosure is not prohibited by law and meets the other requirements of Section 7114(b)(4).

a. In the first of the cases presented in the petition, the American Federation of Government Employees, Local 3354, AFL-CIO (AFGE or union), relying on Section 7114(b)(4), requested a list of names and home addresses of bargaining-unit employees represented by AFGE and employed by the Farmers Home Administration Finance Office, St. Louis, Missouri (FmHA) (Pet. App. 64a). AFGE claimed that it needed the information to "obtain the[] views [of employees] on bargaining priorities" and asserted that "available communication channels [were] inadequate" for that purpose (*id.* at 66a).[1] FmHA denied the request on the ground that disclosure without employee consent would violate the Privacy Act, 5 U.S.C. (& Supp. IV) 552a. Pet. App. 66a.

AFGE filed an unfair-labor-practice charge with the Authority, contending that the agency's refusal to furnish the requested names and home addresses violated 5 U.S.C. 7116(a)(1), (5), and (8), and the Authority issued a complaint (Pet. App. 63a-64a). The administrative law judge (ALJ) issued a decision, holding that FmHA had not committed an unfair labor practice by refusing to disclose the requested information (*id.* at 63a-80a). The ALJ concluded that the union had effective alternative means of communicating with its members and recom-

[1] During the hearing on this case before the ALJ, AFGE "acknowledged freely that addresses were vitally needed in connection with membership drives" and "for the purpose of recruiting new members" (Pet. App. 66a).

mended that the complaint be dismissed (*id.* at 74a-80a).[2]

b. On July 22, 1985, the Authority affirmed the ALJ's decision. Pet. App. 56a-62a (*FmHA I*). In *FmHA I*, the Authority concluded that the "prohibited by law" proviso to Section 7114(b)(4) incorporates the relevant provisions of the Privacy Act, 5 U.S.C. (& Supp. IV) 552a, which generally prohibits disclosure of information about individuals by federal agencies without their consent unless an exception applies. Since one of the exceptions to the Privacy Act (5 U.S.C. 552a(b)(2)) permits disclosure of information "required" to be released under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552, the Authority looked to Exemption 6 of FOIA—which permits withholding of "personnel * * * medical * * * and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6))—to determine whether the refusal to disclose was proper. Pet. App. 58a-59a. Based on the employees' " 'strong privacy interest in their home addresses,' " the Authority concluded that "disclosure of unit employees' names and home addresses for the purposes for which they were sought herein was 'prohibited by law,' " that "their release * * * was not required pursuant to section 7114(b)(4)," and that the complaint should be dismissed. Pet. App. 60a-61a (quoting *AFGE, Local 1923* v. *HHS*, 712 F.2d 931 (4th Cir. 1983)).[3]

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[2] In view of his conclusion, the ALJ found it unnecessary to pass on the agency's claim that disclosure would violate the Privacy Act (Pet. App. 80a n.10).

[3] In so ruling, the Authority did not address whether another exception to the Privacy Act's disclosure requirements

Because it held that release of the addresses is "prohibited by law" within the meaning of Section 7114(b)(4), the Authority found it unnecessary to "reach the question of whether the data sought herein meets [*sic*] the other requirements of section 7114 (b)(4)" (Pet. App. 61a n.8). Thus, the decision in *FmHA I* expressed no view on the question whether employee home addresses constitute data "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" (5 U.S.C. 7114(b)(4)(B)).

c. As permitted by 5 U.S.C. 7123(a), the union filed in the D.C. Circuit a petition for review of the Authority's decision in *FmHA I* (see Pet. App. 39a). Before the case was briefed, the Authority moved for and was granted a remand in order to address whether disclosure of the names and home addresses is not "prohibited by law" because of the "routine use" exception (see note 3, *supra*) to the Privacy Act. *AFGE, Local 3354* v. *FLRA*, No. 85-1493 (D.C. Cir. Mar. 3, 1986).[4]

—"for a routine use" that "is compatible with the purpose for which [the record] was collected" (5 U.S.C. 552a(a)(7), (b)(3))—might also apply.

[4] At the same time, the Authority requested remand of three other cases (including the companion case here) in which unions had petitioned for review of Authority decisions that had followed the precedent established in *FmHA I*. See Pet. App. 39a-40a (collecting citations). Both the D.C. Circuit and the Eighth Circuit granted the Authority's motions, but the Second Circuit denied the motion and proceeded to decide the case on the merits. *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986). Noting its perception that "the privacy interest of the average employee in his address is not particularly compelling," that the ALJ in that case had found that "other means of communication [were] inadequate," and

d. On remand, the Authority reversed its *FmHA I* decision. Pet. App. 38a-55a (*FmHA II*). In *FmHA II*, the Authority reiterated its holding that the "prohibited by law" proviso in 5 U.S.C. 7114(b)(4) requires application of the Privacy Act and FOIA. The Authority now held, however, that disclosure of federal workers' names and home addresses is not protected by FOIA Exemption 6 and therefore is not prohibited by the Privacy Act. Pet. App. 43a-45a. Agreeing with the Second Circuit in *AFGE, Local 1760* that " 'the privacy interest of the average employee in his address is not particularly compelling' " (Pet. App. 44a (quoting 786 F.2d at 556); see note 4, *supra*), the Authority concluded that the "public interest to be furthered by providing the Union with an efficient method to communicate with unit employees it must represent far outweighs the privacy interest of individual employees in their names and home addresses" (Pet. App. 45a).

The Authority also concluded that disclosure is authorized by the "routine use" exception to the Privacy Act, 5 U.S.C. 552a(b)(3). Relying on a "routine use" notice issued by the Office of Personnel Management (OPM) (49 Fed. Reg. 36956 (1984)), which provides for disclosure of certain information to labor organizations "when relevant and necessary

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that the union had received "statutory approval * * * as collective bargaining agent" for employees under the Labor Statute, the Second Circuit reversed the Authority's decision; the court held that "release of the employees' addresses is not 'prohibited by law' within the meaning of * * * 5 U.S.C. 7114(b)(4)." 786 F.2d at 556-557. The court also held that it was "clear" that the "other requirements for release contained in the Statute" (*i.e.*, that the requested data be necessary to collective bargaining) were met, even though the Authority itself had not passed on that question (*id.* at 557).

to their duties of exclusive representation," the Authority concluded that OPM's "routine use" notice is "effectively the same" as the requirement of Section 7114(b)(4) that the data sought be " 'necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining' " (Pet. App. 45a). Based on its determination that "disclosure of the names and home addresses of bargaining unit employees to the Union is necessary * * * for the Union to discharge its statutory obligations," the Authority held that disclosure is authorized as a "routine use" under the Privacy Act (*id.* at 46a).

Having abandoned its prior holding that disclosure is prohibited by law, the Authority was now required to address the threshold question, which it had previously avoided (Pet. App. 61a n.8), whether employee home addresses are the kind of "data" addressed by Section 7114(b)(4) (*i.e.*, whether they are "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining"). The Authority now answered that question in the affirmative, rejecting agency arguments that (1) employee home addresses are unrelated to the bargaining process—as opposed to a union's other representational functions—and thus are not "necessary" according to the plain language of the statute and (2) in any event such addresses cannot be "necessary"—as opposed to merely useful—to the union unless the union lacks adequate alternative means of communication with the employees. As to the first of those arguments, the Authority held, without mentioning the limiting phrase "collective bargaining" in Section 7114(b)(4)(B), that "[i]t is obvious that a union must be able to identify

and communicate with * * * bargaining unit members if it is to adequately represent them" (Pet. App. 48a). As to the second, the Authority held, again without adverting to the language of the statute, that "[w]e will not review the adequacy of alternative methods of communication on a case-by-case basis" (*id.* at 49a).[5]

2. a. In the second case here, the National Federation of Federal Employees, Local 1827 (NFFE or union), requested "a complete listing of bargaining

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[5] The Authority has since directly contradicted that holding in argument before the Third Circuit. In contrast to its explicit refusal in *FmHA II* to consider alternative means of communication available to the union as part of determining whether names and home addresses are "necessary" within the meaning of Section 7114(b)(4), the Authority stated before the Third Circuit that "in each case it has considered the alternative means available." *Department of Navy* v. *FLRA*, 840 F.2d 1131, 1139 (1988), cert. dismissed, No. 88-356 (Oct. 5, 1988). The Third Circuit relied on that assurance from the Authority and, in the particular case before the court, affirmed the Authority's order of disclosure, stating that "in this case the FLRA's conclusion that the alternative means of communication are inadequate is amply supported by the record" (840 F.2d at 1139). In the order that the Third Circuit was reviewing, however, the Authority had reached no such case-specific conclusion, relying instead on the per se rule of *FmHA II* that names and home addresses are "necessary" without regard to the existence of alternaitve means of communication. See *Philadelphia Naval Shipyard*, 24 F.L.R.A. 37 (1986). In its prior (pre-*FmHA II*) order in the same case—the only time the Authority did reach a case-specific conclusion about the adequacy of alternative means of communication—the Authority had held that the alternative means of communication available to the union *were* adequate, the precise opposite of the (nonexistent) conclusion that the Third Circuit purported to affirm. See *Philadelphia Naval Shipyard*, 19 F.L.R.A. 899, 901 & n.5 (1985).

unit members names and addresses" from the Defense Mapping Agency Aerospace Center, St. Louis, Missouri (DMA). The union stated that the request was made "[i]n order for the Union to communicate with bargaining unit members." Pet. App. 101a-102a. The agency denied the request on the basis that the information was not maintained in a " 'reasonably available' form" (Pet. App. 105a). NFFE filed an unfair-labor-practice charge with the Authority, and the Authority issued a complaint (*id.* at 99a). An ALJ issued a decision, holding that DMA's refusal to release the requested information constituted an unfair labor practice (*id.* at 98a-136a). The ALJ concluded that the requested information was "reasonably available," that the other requirements of Section 7114(b)(4) had been met, and that "alternative sources are neither reasonable nor effective" (Pet. App. 114a-129a). The ALJ also concluded that release would not violate the Privacy Act (*id.* at 130a-132a).

b. The Authority reversed the decision of the ALJ (Pet. App. 92a-97a). Relying on its prior decision in *FmHA I*, the Authority concluded that "disclosure of unit employees' names and home addresses * * * was 'prohibited by law' and * * * their release by [DMA] was not required pursuant to section 7114 (b)(4)" (Pet. App. 96a). As we have noted (see note 4, *supra*), NFFE sought review of that decision before the Eighth Circuit and, before briefing, the Authority sought and obtained a remand of the decision "to consider the 'routine use' question" (see Pet. App. 21a).

c. On remand, the Authority reversed itself and, in reliance on its decision in *FmHA II*, affirmed the ALJ's decision, "conclud[ing] that the release of the

names and home addresses of bargaining unit employees * * * is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets the other requirements of section 7114 (b) (4)." Pet. App. 85a. The Authority also held that DMA's refusal to furnish the requested information constituted an unfair labor practice (*id.* at 85a-86a).

3. On the agencies' petitions for review and the Authority's cross-petitions for enforcement, the court of appeals partially affirmed both decisions but remanded for certain additional proceedings (Pet. App. 19a-32a). Agreeing with the Authority's determination that, "in order for a union to properly represent the employees [in the bargaining unit,] it must be able to communicate with them," the court of appeals held that Section 7114(b) (4) "provides a statutory basis entitling the union to some effective means of communication with unit employees" (Pet. App. 23a). Framing the issue as "whether to uphold the Authority's determination that disclosure to the union is necessary to fair and effective bargaining and representation," the panel majority also held that the Authority's position that "direct communication with employees at home * * * will best serve the purposes underlying the labor statute" was not "irrational" or "arbitrary or capricious" (*id.* at 24a).

Turning next to the FOIA privacy exemption (and "weigh[ing] the privacy interest of the employees against the interests of the public in disclosure"), the court of appeals concluded that, although "employees have a cognizable privacy interest in their home addresses," it would "defer to the Authority's expertise insofar as it has determined that disclosure in general will help effect the policies embodied in the

[Labor Statute]" (Pet. App. 27a-28a). Hence, the panel affirmed the Authority's determination that the requested information is generally disclosable under the Labor Statute. In closing, however, the panel expressed concern with the potential objections of individual employees "who do not wish to have their names and addresses disclosed" and the Authority's response that such individuals could simply "have their names removed from the union mailing list" (*id.* at 28a). In order to provide a "workable formula" for accommodating "the privacy interests of employees and the need of the union to communicate effectively" under its disclosure order, the panel directed the FLRA on remand to devise a procedure by which "employees [could] request their employers to keep the information confidential" (*id.* at 28a-29a). Chief Judge Lay dissented from the panel's holding, insofar as it permitted "employees [to] ask their *employers* to keep the information confidential," because he concluded that such a requirement was without legal basis and abdicated the court's responsibilities under the relevant statutes (*id.* at 31a-32a (emphasis in original)).

ARGUMENT

Although we disagree with the Authority on many aspects of this case, we agree with the Authority that the judgment of the court of appeals should not be permitted to stand. For two reasons, however, this case does not warrant plenary review by this Court. First, respondents are in the process of promulgating "routine uses" that will permit them to disseminate the home addresses of employees to the unions that represent those employees. Because those "routine uses" will completely remove any bar that the Pri-

vacy Act might otherwise impose to the disclosures sought in this case—without any employee opt-out procedure as required by the court of appeals—the court of appeals should be directed to reconsider its judgment in light of the routine uses. On such reconsideration, we will agree with the Authority that the court of appeals should enforce the Authority's orders in full. Second, although we think the correct result in this case (before respondents' adoption of "routine uses") would have been to reverse the Authority in full—and deny disclosure of any employee home addresses—we agree with the Authority that the middle ground the court of appeals attempted to stake out between our position and the Authority's position is entirely without legal basis. Thus, even in the absence of material changes postdating the decision of the court of appeals, we would not defend the judgment of the court of appeals but would instead advocate summary reversal of the court's remand order.

1. We have not cross-petitioned for review of the Eighth Circuit's decision insofar as it affirms the Authority in part, but we will briefly set out our view of the merits to illuminate our reasons for urging the Court to vacate the judgment of the court of appeals. In our view, the court of appeals should have held that 5 U.S.C. 7114(b)(4) does not require the disclosure of employee home addresses and should have reversed the Authority's orders in their entirety. There are two distinct reasons why that would have been the correct result. First, the threshold criteria of Section 7114(b)(4) are not met in this case, and the requirement of disclosure of employee home addresses pursuant to that section therefore is improper even without regard to whether such disclosure is

"prohibited by law." Second, even if we assume arguendo that employee home addresses meet the threshold criteria of Section 7114(b)(4), disclosure of employee home addresses is not mandated by FOIA —because Exemption 6, for "clearly unwarranted invasion[s] of personal privacy," applies—and therefore (in the absence of applicable "routine uses") is "prohibited by law" (*i.e.*, by the Privacy Act) within the meaning of Section 7114(b)(4).

a. Section 7114 is expressly and exclusively concerned with "[t]he duty of an agency and an exclusive representative to negotiate in good faith," *i.e.*, the collective-bargaining process. Accordingly, Section 7114(b)(4) has no application at all except to data that are "reasonably available and necessary for full and proper discussion, understanding, and negotiation of *subjects within the scope of collective bargaining* (5 U.S.C. 7114(b)(4)(B) (emphasis added)). The term "collective bargaining," in turn, is defined in the Labor Statute to refer only to the actual process of contract negotiations and agreement, not to subsequent representation or other activities by a union on behalf of its members (5 U.S.C. 7103(a)(12)). The legislative history of Section 7114(b) supports this limited construction. See H.R. Rep. 95-1403, 95th Cong., 2d Sess. 48 (1978) (referring to "data necessary for the negotiations"). The Authority held that this Section applies to employee home addresses without making any effort at all to show a link between those addresses and the collective-bargaining process (Pet. App. 48a). For that reason alone, the Authority's orders should not have been enforced.

Furthermore, Congress deliberately chose the word "necessary" in Section 7114(b)(4). If adequate al-

ternative means of communication are available to the union, then it cannot properly be said—if words have their ordinary meaning—that it is "necessary" for the union to have home addresses as well in order to communicate with the employees. The Authority has effectively conceded as much even while continuing to hold federal employers guilty of unfair labor practices without regard to the availability of alternative means of communication (see note 5, *supra*). For this reason as well, enforcement of the Authority's orders should have been denied.

b. Even if employee home addresses are, as the Authority contends, per se "necessary" within the meaning of Section 7114(b)(4), it is undisputed that disclosure of those addresses still is not required if it is "prohibited by law," and it is also undisputed that disclosure is prohibited by the Privacy Act unless one of the Privacy Act's exceptions applies. The Privacy Act exception for "routine uses" (5 U.S.C. 552a(b)(3)) does not, at present, apply to this case.[6]

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[6] The Authority has incorrectly contended that the "routine use" exception does apply, because of OPM's routine use for disclosure of certain information "relevant and necessary" to unions' duties. Whatever the word "necessary" may mean in 5 U.S.C. 7114(b)(4), a matter that depends on the intent of Congress, the use of that word in an agency regulation must be interpreted in accordance with that agency's intent. See, *e.g.*, *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, No. 86-327 (Dec. 14, 1987), slip op. 22-23 (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). As we explained in our reply brief in the court of appeals in this case (at 15), citing comments that OPM itself filed before the Authority in *FmHA II* (but that the Authority appears to have ignored), OPM construes the word "necessary" in its routine use literally, to mean that disclosure is not required unless the union has no adequate

But see pp. 20-22, *infra*. Disclosure is therefore prohibited by the Privacy Act unless the exception for disclosures required by FOIA (5 U.S.C. 552a (b)(2)) applies.

Disclosure of employee home addresses is not required by FOIA because it would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 6, 5 U.S.C. 552 (b)(6). Abundant case law supports the proposition that an employee's home address is imbued with a strong privacy interest; many courts have protected that information under Exemption 6.[7] Likewise, abundant case law supports the proposition that any privacy interest cognizable under Exemption 6 is to be balanced against the *public* interest in disclosure, not against any particular requester's interest in disclosure.[8] Thus, only by considering a factor that is,

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means of communication. No court has yet passed on our contention that the Authority has misconstrued OPM's routine use.

[7] *Local 3, IBEW* v. *NLRB*, 845 F.2d 1177 (2d Cir. 1988); *Minnis* v. *Department of Agriculture*, 737 F.2d 784, 787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 529 (6th Cir.), cert. denied, 469 U.S. 1034 (1984); *AFGE, Local 1923* v. *HHS*, 712 F.2d 931, 932 (4th Cir. 1983); *Madeira Nursing Center, Inc.* v. *NLRB*, 615 F.2d 728, 731 (6th Cir. 1980); *Pacific Molasses Co.* v. *NLRB*, 577 F.2d 1172, 1183 (5th Cir. 1978); *Committee on Masonic Homes* v. *NLRB*, 556 F.2d 214, 221 (3d Cir. 1977); *Wine Hobby USA, Inc.* v. *IRS*, 502 F.2d 133, 136-137 (3d Cir. 1974); see also *United Association of Journeymen, Local 598* v. *Department of the Army*, 841 F.2d 1459, 1465 (9th Cir. 1988) (Skopil, J., concurring).

[8] *Schell* v. *HHS*, 843 F.2d 933, 938 & n.2 (6th Cir. 1988); *Department of the Air Force* v. *FLRA*, 838 F.2d 229, 233

legally, totally irrelevant—the specific "need" of the unions in these cases for this information—can a court distinguish the multitude of cases protecting home addresses under Exemption 6.[9] The courts should not rely on such irrelevancies but should instead apply in this context the case law holding that home addresses are protected by Exemption 6. For that reason, and because the Authority misconstrued 5 U.S.C. 7114(b), the court below should have denied enforcement of the Authority's orders in their entirety.

(7th Cir. 1988), cert. dismissed, No. 88-354 (Oct. 5, 1988); *Aronson* v. *HUD*, 822 F.2d 182, 185-186 (1st Cir. 1987); *Reporters Committee for Freedom of the Press* v. *Department of Justice*, 816 F.2d 730, 741-742, modified, 831 F.2d 1124 (D.C. Cir. 1987), cert. granted, No. 87-1379 (Apr. 18, 1988); *Washington Post Co.* v. *HHS*, 690 F.2d 252, 258 & n.17 (D.C. Cir. 1982); *Ditlow* v. *Shultz*, 517 F.2d 166, 172 n.21 (D.C. Cir. 1975); see also Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. Legal Stud. 775, 781 & nn.34 & 35 (1980).

[9] Consideration of that legally irrelevant factor is precisely the error that the FLRA committed in its lead case (see Pet. App. 45a) and that one court has committed in upholding an FLRA order similar to the ones in this case. *Department of Navy* v. *FLRA*, 840 F.2d at 1136-1137. Two other courts, and the Authority (see Pet. App. 44a), have simply disagreed with all of the cases suggesting that one's privacy interest in a home address is strong. *Department of the Air Force* v. *FLRA*, 838 F.2d at 232 (interest is "minuscule"); *AFGE, Local 1760* v. *FLRA*, 786 F.2d at 556 ("not particularly compelling"). One other court, which had previously and correctly recognized that an employee's privacy interest in his home address is sufficient to defeat a union's FOIA request, inexplicably chose to "defer" to the Authority's contrary conclusion. Compare *HHS* v. *FLRA*, 833 F.2d 1129, 1135 (4th Cir. 1987), cert. dismissed, No. 88-355 (Oct. 5, 1988), with *AFGE, Local 1923* v. *HHS*, *supra*.

2. We believe that the analysis outlined above is correct, but the courts that have so far considered the Authority's orders requiring disclosure of employee home addresses have not accepted our analysis. Given the current state of the case law, we have decided not to cross-petition for a writ of certiorari to review the judgment of the court of appeals insofar as it accepts the Authority's analysis. Thus, for purposes of the current proceeding we must accept the proposition that the threshold criteria of 5 U.S.C. 7114(b)(4) are met and that the case turns entirely on whether disclosure of employee home addresses is otherwise "prohibited by law." As noted above, we believe that disclosure is so prohibited because of the Privacy Act and FOIA Exemption 6. The Authority originally reached that conclusion but now advances the opposite theory. Whichever theory may be correct (ours or the Authority's), what cannot be correct is the theory of the court of appeals that disclosure is permitted (and required) by law if but only if the employee is given an advance opportunity to veto the disclosure and elects not to do so.

Although we strongly disagree with the Authority's sweeping pronouncements concerning the need for an unrestricted "flow of data" concerning federal employees to a union representative under the provisions of the Labor Statute (Pet. 15-18, 24-25), we would agree, in the context of a request from the exclusive representative for the names and home addresses of members of the "bargaining unit," that there is nothing in the language of either Section 7114(b)(4) or its legislative history [10] that suggests

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[10] See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 48 (1978) (agency's duty to furnish "reasonably available data necessary for [collective-bargaining] negotiations" to the exclusive representative).

that Congress understood that bargaining unit members would have an unqualified, "individualized" veto over the release of such information.

Nor do we find support for such a requirement under the provisions of either the Privacy Act or FOIA. The Privacy Act was enacted by Congress "to protect the privacy of individuals identified in information systems maintained by Federal agencies" (Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896), but the very structure of the statute itself—which provides for nondisclosure *unless either* individual consent is obtained *or* one of twelve exemptions has been satisfied—indicates that Congress understood that an individual would *not* have an absolute veto over disclosure of information. See 5 U.S.C. (& Supp. IV) 552a(b)(1)-(12). Rather, despite an individual's lack of consent, the Privacy Act authorizes disclosure of information about that individual in a specified number of instances, one of which is when the information is disclosable under FOIA. 5 U.S.C. (& Supp. IV) 552a(b) ("[n]o agency shall disclose any record * * * except * * * with the prior written consent of * * * the individual to whom the record pertains, *unless* disclosure of the record [falls within one of the twelve exceptions, including FOIA]") (emphasis added).

Similarly, the courts have held that FOIA does not require an agency "to track down an individual about whom another has requested information merely to obtain the former's permission to comply with the request." *Blakey* v. *Department of Justice*, 549 F. Supp. 362, 365 (D.D.C. 1982) (applying Exemption 7(C)), aff'd mem., 720 F.2d 215 (D.C. Cir. 1983); cf. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975) ("insofar as the order of the court

below requires the agency to create [additional documents to respond to a FOIA request], it is baseless"). Rather, when dealing with a request for information under FOIA, the disclosure of which might result in "a clearly unwarranted invasion of personal privacy," 5 U.S.C. 552(b)(6), an agency (and ultimately, a court) is required to "balanc[e] the public's right to disclosure against the individual's right to privacy" (*Department of the Air Force* v. *Rose*, 425 U.S. 352, 372 (1976))—a test that contemplates that, under some circumstances, private information about individuals may be released, despite the lack of consent.

No court has ever before imposed an opt-out requirement in the name of the Privacy Act or FOIA, and with good reason. The Privacy Act imposes monetary liability on the United States for "intentional or willful" disclosures in violation of the Act (5 U.S.C. 552a(g)(4)), and if an opt-out requirement became established law the government would be threatened with monetary liability every time it gave out any information (no matter how innocuous) about an individual without first seeking and obtaining that individual's consent. If Congress had intended to impose such a tremendous burden of prior consultation on federal agencies, it would have said so in the statute. It is not open to the courts at this late date to "discover" for the first time that either the Privacy Act or FOIA contains such an unarticulated and heretofore unheard-of requirement to seek advance consent before every disclosure. Rather, the correct means of striking the balance between individual privacy and the public interest in disclosure of information is, as the Authority argues (Pet. 18-22, 25-27), the traditional balancing of interests by the agency, subject to judicial review. We do not agree

with the Authority's current position as to how that balancing should come out in this context, but we agree with the Authority that such balancing, and not an employee veto provision that seems "optimal[]" to a court (Pet. App. 29a) but has no statutory foundation, should be the basis for resolving this case. Thus, if there had been no further legal developments since the Eighth Circuit rendered its decision, we would urge that the Court accept the Authority's argument to the extent we have indicated and summarily reverse the decision below so that the court of appeals could determine, applying the proper balancing test, whether full disclosure or full withholding of employee home addresses is the appropriate result in this case.

3. Because the Eighth Circuit's "solution" to the problem posed by these cases is not an acceptable one, respondents have elected not merely to rely on the possibility that this Court would reverse the Eighth Circuit on the merits. Instead, acting within the confines of powers granted them by Congress, respondents have taken steps that should make it possible to release the information sought by the unions—without any requirement that employees be given an advance opportunity to "opt out"—in this case even if the Eighth Circuit's reasoning were correct.[11]

Under 5 U.S.C. 552a(a)(7) and (e)(4)(D), agencies have the power to promulgate "routine use[s]," compatible with the purpose for which information was collected, that permit the disclosure of information without regard to the applicability of any other exception in the Privacy Act (see 5 U.S.C. 552a(b)

[11] We would, of course, prefer a solution that would permit the withholding of all of this information, but it is not within respondents' power to bring about that result.

(3)). Accordingly, on October 11, 1988, the Department of Agriculture (the parent agency of respondent FmHA) published for comment a routine use to permit disclosure to "labor organizations recognized under 5 U.S.C. Chapter 71" of "home addresses or designated mailing addresses of bargaining unit employees" (53 Fed. Reg. 39629). The routine use will become effective on November 10, 1988, without further notice unless comments are received that would require a contrary determination (*ibid.*). Likewise, the Department of Defense (the parent agency of respondent DMA) plans in the near future to publish a routine use that will cover DMA's disclosure to a labor organization of the precise information sought in this case. We will, of course, promptly notify the Court of publication of DMA's routine use and finalization of both routine uses.

Once those routine uses are in place, it will be clear that 5 U.S.C. 552a(b)(3) excepts particular disclosures of the employee home addresses at issue in this case from the prohibition on disclosure contained in the Privacy Act, *whether or not* any other Privacy Act exception applies. Because the Privacy Act exceptions are stated in the alternative (5 U.S.C. (& Supp. IV) 552a(b)(1)-(12)), it will be improper, once the exception for "routine use[s]" clearly applies, to rely on the exception (5 U.S.C. 552a(b)(2)) for disclosures required by FOIA as a basis to limit the disclosure to collective-bargaining representatives of the precise information sought in this case. In other words, the Eighth Circuit's novel FOIA analysis will become irrelevant. Accordingly, the Court should hold the petition pending finalization of the two routine uses and should then vacate the judgment of the Eighth Circuit and remand for further proceedings.

Because the Eighth Circuit has already determined (Pet. App. 22a-24a) that the threshold requirements of 5 U.S.C. 7114(b)(4) are met (and we have not sought review of that holding although we believe it to be erroneous), there will be no obstacle to enforcement of the Authority's orders on remand. Thus, we will agree with the Authority on remand that the Eighth Circuit should enforce those orders in full.

CONCLUSION

The petition for a writ of certiorari should be held pending finalization of the routine use recently published for comment by the Department of Agriculture and pending publication and finalization of a similar routine use by the Department of Defense. The petition for a writ of certiorari should then be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of the new routine uses.[12]

Respectfully submitted.

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[12] If the Court chooses not to take that course of action, then the judgment of the court of appeals should be summarily reversed on the ground that, even apart from the new routine uses, the "opt-out" requirement that the court of appeals devised has no basis in law.

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